KUPUSAMY SIDAMBARAM A

v.

VERAPAN SINATHAMBY & ORS

HIGH COURT MALAYA, TAIPING B
AHMAD NASFY YASIN JC
[ORIGINATING SUMMONS NO: 24 NCVC-14-8-9-2012]
6 MARCH 2013

CIVIL PROCEDURE: *Striking out - Application for - Striking out or setting aside of small estate distribution order - Wrong information given by administrator of estate - Estate transferred under administrator's name wholly - Subsequent transfer to third party - Whether transfer of estate valid and effective - Power of High Court to grant declaratory relief - Whether application barred by s. 418 of National Land Code or s. 2(a) of Public Authorities Protection Act 1948* C D

SUCCESSION: *Administration - Administration action - Deceased left immoveable property intestate - Wrong information given by administrator of estate - Administrator claimed to be sole beneficiary of estate - Estate transferred under administrator's name wholly - Subsequent transfer to third party - Application to strike out or set aside small estate distribution order - Small Estate (Distribution) Act 1955 - National Land Code, s. 418* E

The deceased, who had five children, left an immoveable property ('the deceased's estate') intestate. The deceased's grandson ('the first respondent') submitted a petition under s. 8 of the Small Estate (Distribution) Act 1955 ('the Act') *via* Form A. In Form A, the first respondent declared that the beneficiaries to the deceased's estate were only him and his deceased father (the deceased's son). A hearing before the Land Administrator was held in the absence of the appellant and based on the wrong information given by the first respondent, the Land Administrator issued the distribution order through Form F and appointed the first respondent as the administrator of the estate of the deceased. As the administrator, the first respondent made another application *via* Form T to the Land Administrator and transferred the deceased's estate onto his name wholly. Three months later, the first respondent transferred the said property unto the second respondent. The appellant filed the present application to strike out or set aside the small estate distribution order obtained through Form F in the deceased's estate and further transfer of F G H I

A the same to the second respondent. The issues that arose for the court's determination were: (i) whether the court was bestowed with the power to grant declaratory relief; (ii) whether the appellant's right to appeal was barred by s. 418 of the National Land Code ('NLC') or s. 2(a) of the Public Authorities Protection
B Act 1948 ('PAPA'); (iii) whether the appellant failed to show the nexus that he was the grandson of the deceased; and (iv) whether the transfer from the first respondent to the second respondent was valid and effective.

C **Held (allowing application with costs):**

(1) The High Court has the general authority under the NLC, especially under s. 417(1) and (2)(a) to enable the court to grant declaratory relief to the party aggrieved since there was no other remedy available for the appellant. Section 417 of the
D NLC clearly provides that 'the court or a judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land and it shall be the duty of the Registrar or Land Administrator to
E comply with the order forthwith'. (para 22)

(2) Section 418 of the NLC is only applicable to any party who has appeared before the Land Administrator and attended the hearing and if he is not satisfied or aggrieved by the said
F decision or order given by the land administrator, is to appeal within three months beginning with the date on which it was communicated to him. In the present case, the appellant was not an aggrieved person as provided under s. 418 of the NLC because the appellant had never attended the hearing before
G the Land Administrator or neither the appellant was told of the hearing or about the orders obtained by the first respondent and nothing was communicated to him as to that effect by both the respondents. Further, s. 2(c) of the PAPA was not applicable in the present case as no action had been
H brought against the government. (paras 25 & 26)

(3) It was proven that the appellant's deceased father was also the lawful son of the said deceased and was the rightful beneficiary under the estate. However, the appellant's father

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also died intestate. During his lifetime, the appellant's deceased father, the appellant and the deceased had been staying on the property. The appellant was still staying on the said property and was paying quit rent and assessment for the past 60 years. Under the Distribution Act 1958, the appellant's father had the right over the deceased's estate, being the lawful son and also the other beneficiaries of the estate. The appellant, as the next rightful issue to the deceased's estate and also the other beneficiaries, could not be denied their right and beneficial interest to acquire/inherit the said deceased's estate. (para 28)

(4) The first respondent had fraudulently obtained the deceased's estate by disclosing untrue facts and giving false information to the Land Administrator. As a result of this false information, the Land Administrator had granted the order to the first respondent and the first respondent subsequently transferred the same to the second respondent. Since the ownership of the deceased's estate was by way of fraud and misrepresentation, the transfer from the first respondent to the second respondent was also invalid, ineffective and had to be set aside. (paras 29, 30 & 31)

Case(s) referred to:

Ahmad Abd Majeed lwn. Habibah Abdul Majid & Satu Lagi [2007] 4 CLJ 355 CA ***(refd)***

Development & Commercial Bank Bhd v. Government of Malaysia & Ors [1989] 2 CLJ 1205; [1989] 1 CLJ (Rep) 486 HC ***(refd)***

Ismail bin Mohamad v. Mayah & 2 Ors [1987] 1 LNS 60 HC ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Mohd Nadir A Syed Ahamed & 13 Ors v. Zubaidi Abdul Hamid & 2 Ors [1994] 3 CLJ 204 HC ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(foll)***

Legislation referred to:

Distribution Act 1958, s. 6(1)(c)
National Land Code, ss. 340(3), 417(1), 2(a), 418
Public Authorities Protection Act 1948, s. 2(a)
Small Estate (Distribution) Act 1955, ss. 8, 11A(1), 13, 29(1)

For the appellant - Govindarajoo; M/s Nurbaya Govind & Co
For the respondents - Harbhajan Kaur; M/s Sudesh Narinder & Partners

Reported by Najib Tamby

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JUDGMENT

Ahmad Nasfy Yasin JC:

Introduction

B **[1]** This is an appeal by the appellant which has been filed through originating summons (encl. 2) to strike out/set aside the Small Estate Distribution Order obtained through Form F dated 8 June 2004 (exh. "KS6" as in the appellant's affidavit in support) which involved the property registered under GM3407 and C GM 3408, Lot No: 9673 and 9674, Mukim Parit Buntar, Main Trunk Road, District of Kerian, Perak in the estate of Theilammay d/o Kumurasamy ("deceased's estate") and further transfer of the deceased's estate to the second respondent.

D **[2]** The OS *vide* encl. 2 had prayed for the following reliefs:

(a) That the appellant be granted leave to file this appeal which is out of time as provided;

(b) A declaration that the Small Estate Distribution Order on the E estate of Theilammay d/o Kumarasamy ("deceased") granted by the Land Administrator of Kerian, Perak through Form F (the initial application) under s. 13 of the Small Estate (Distribution) Act 1955, Order of Distribution No. GPK 3407 and 3408, Lot No: 9673 and 9674, Mukim Parit Buntar, Main F Trunk Road, District of Kerian, Perak together with premises No. 391, Sungai Rawa, 34200 Parit Buntar erected thereon which was obtained by the first respondent, Verapan a/l Sinathamby is invalid, ineffective and has to be set aside/struck out and the application for distribution order to be heard again G because it was made in the absence of the appellant;

(c) A declaration that the land administration officer of the Small Estate of District of Kerian be authorised to have a hearing on the deceased's estate who is the initial registered owner, H ie, Theilammay d/o Kumarasamy, deceased and the said estate be distributed accordingly to the beneficiaries as per the law of intestacy and also Small Estate (Distribution) Act 1955;

(d) A declaration that the transfer made under the deceased's I estate through presentation No. 1232/2006 on the said property held under GM 3407 and GM 3408, Lot No. 9673 and 9674, Mukim Parit Buntar, Main Trunk Road, District of

Kerian, Perak together with the premises No. 591, Sungai Rawa 34200 Parit Buntar, Perak from Verapan a/l Sinathamby (first respondent) to Bala Murugan a/l Verapan (second respondent) is invalid, ineffective and has to be set aside;

(e) An order to prevent the defendants, their agents, and their workers or any one from administering the said deceased's estate in any whatsoever manner until the hearing and disposal of this action/appeal on/or until any such order is made by the Honourable Court which it thinks fit and proper;

(f) That the Private Caveat Nos 725/2011 and 752/2011 entered in the register for lot No. 9673 and 9674, Mukim Parit Buntar, Main Trunk Road, District of Kerian, Perak held under GM No. 3407 and 3408 respectively by the appellant be entered and to be maintained in the registered document of title for the said properties until the hearing and full settlement of this appeal or until any such order is made by the Honourable Court which it thinks fit and proper;

(g) That an order be made instructing the Land Administrator of District of Kerian to do the necessary as required to give effect to the order made thereafter; and

(h) That the cost for this appeal borne by the first and second respondent.

Factual Background

[3] The deceased, Theilammay d/o Kumarasamy ("the said deceased") through her marriage to Verapan Kovinder s/o Murugan Kovindan also a deceased had five children's of the marriage, namely:

(a) Sidambaram s/o Verapan (ie, the appellants father)

(b) Palaniappan s/o Verapan;

(c) Sinathamby s/o Verapan (ie, first respondent's father)

(d) Palania Yee d/o Verapan; and

(e) Parvathi d/o Verapan (who has converted to Islam now)

[4] The birth certificates, death certificates and also the marriage certificate between Theilammay d/o Kumarasamy and Verapan Kounder Son Of Murugan Kovindan could not be obtained due to the fact that the Registry of the Birth and Death could not locate the same. However, the appellant only managed to produce the appellant's birth certificate as exhibited "KS1" in the appellant's supporting affidavit.

[5] During the time of death, the said deceased had left an immovable property intestate wherein property is registered under No. GM 3407 and 3408, Lot No. 9673 and 9674 Mukim Parit Buntar, Main Trunk Road, District of Kerian, Perak together with premises No. 591, Sungai Rawa, 34200 Parit Buntar, Perak erected thereon. ("the deceased's estate")

[6] The first respondent who is the grandson of the said deceased has submitted a petition under s. 8 of the Small Estate (Distribution) Act 1955 in Form A r. 3(1) of the Small Estate (Distribution) Act 1955 ("exh. KS5"). In said Borang A, the first respondent listed as follows:

(i) Harta simati yang tak boleh dialih GM2661, Lot 1796, Mukim Parit Buntar, Daerah Kerian.

(ii) Waris-waris simati yang berhak kepada sesuatu bahagian harta pusaka;

(a) Sinathamby a/l Verapan - anak kandung (meninggal dunia)

(b) Verapa a/l Sinathamby - cucu kandung.

[7] The said Borang A was filled by the first respondent and was affirmed before the Commissioner of Oath on 16 January 2004 and affirmed that all the contents are to be true to his knowledge under the Statutory Declaration Act 1960. It was then forwarded to the Small Estate Office of Kerian, Perak at Parit Buntar and the application was accepted and registered under registration No. Guaman Pembahagian GPK 34/2004 Tahun 2004.

[8] On 8 June 2004, the Land Administrator of Kerian had only the first respondent for the hearing. During the hearing the first respondent said as stated in "Nota Bicara" (exh. KS6).

(a) ada satu anak Sinathamby, tak ada anak lain;

Further on the next page, the Land Administrator had noted that "Keterangan saksi waris tidak lengkap".

[9] The hearing was done in the absence of the appellant and as a result of the wrong information given by the first respondent, the Land Administrator accepted the first respondent's information to be true and issued the distribution order through "Borang F" dated 8 June 2004 wherein the first respondent was appointed as the administrator of the estate of the deceased.

[10] After the first respondent has been appointed as the administrator of the estate of the said deceased, the first respondent made another application to the Land Administrator of Kerian *via* "Borang T" dated 10 February 2006 and struck out himself as administrator and transferred the estate of the said deceased onto his name wholly ("exh. KS7").

Subsequently, after three months upon the transfer unto his name, the first respondent transferred the said property unto the second respondent on 26 May 2006 (exh. KS8).

[11] On 13 September 2012, the appellant made a land search at District Land Office, Kerian to find out the status of this property since he was stopped from paying the quit rent and assessment and was told by the Land Registry that the property has been transferred to the second respondent and he does not have any rights anymore.

[12] The appellant was shocked on how the said deceased's estate was initially transferred to the first respondent and was subsequently to the second respondent without his knowledge and to safeguard his interest in the said deceased's estate from being denied, on 6 January 2011, the appellant entered a private caveat on the said deceased's estate as reflected in the land search at exh. KS2.

[13] The respondents subsequently applied to the Land Administrator of Kerian to remove the appellant's caveat on 29 April 2011 and subsequently on 12 July 2011 the caveat was removed. However, after the appellant come to know about this removal, he did submit another caveat on 4 August 2011 ("exh. KS10").

A **Issues**

[14] There are essentially five issues to be considered. They are:

(a) Whether the court has power to grant declaratory relief;

B (b) Whether right to appeal was barred by s. 418 of the National Land Code ("NLC 1965");

(c) Whether the matter complained of was time barred by virtue of s. 2(a) of the Public Authorities Protection Act 1948;

C (d) Whether the appellant failed to show the nexus that he's the grandson of Theilammay d/o Kumarasamy; and

(e) Whether the transfer from the first respondent to the second respondent is invalid and ineffective.

D **Appellant's Submission**

[15] Counsel for the appellant has submitted that this Honourable Court has the general authority under the NLC specially s. 417(1) and 2(a) of the NLC to enable the court to grant E declaratory relief to the party aggrieved since there is no other remedy available for the appellant.

[16] The respondents are trying to deprive the appellant of his beneficial rights in the deceased's estate by saying that the F appellant failed to exercise his right of appeal pursuant to s. 418 of the NLC. It is submitted that the appellant is not an aggrieved person in the legal sense as provided under s. 418 of the NLC because the appellant never attended the hearing before the Land Administrator or neither the appellant was told of the hearing date G or about the order obtained by the first respondent and nothing was communicated to the appellant as to that effect by both the respondent. In this case the appellant only knew of the same on 13 September 2012 when the appellant made a land search at the District Land Office Kerian, Perak since he was stopped from H paying the quit rent and assessment for year 2012.

[17] It is also submitted that the Land Administrator has the authority and jurisdiction under the Small Estate (Distribution) Act 1955 to hear and take statements on oath and to record the I statements taken from the first respondent and witness to investigate further on the beneficiaries and rights of ownership in

the estate of the deceased to confirm that the estate of the deceased is owned by the rightful beneficiaries (refer s. 11A(1) of the Small Estate (Distribution) Act 1955).

[18] In this case the appellant as the grandson has a right in the estate of Theilammay d/o Kumarasamy deceased, who is the appellant's father's mother. Under the Distribution Act 1958, the appellant's father has the right over the estate of the said deceased being the lawful son and also the other beneficiaries of the estate since the appellant's father died intestate so, the appellant is the next rightful issue to the said deceased's estate and also the other beneficiaries not named by the first respondent in his application.

(Refer s. 6(1)(c) of the Distribution Act 1958).

[19] Pursuant to s. 29(1) of the Small Estate (Distribution) Act 1955, the appellant being the aggrieved party has the right to appeal.

[20] It was further submitted that the first respondent has obtained the deceased's estate fraudulently as the first respondent disclosed facts which was not true and gave false information to the Land Administrator of Kerian under oath. As a result of this false information in the forms and false affirmation under oath, the Land Administrator has granted the order to the first respondent which is invalid and ineffective.

Based on the above submission, counsel for the appellant pray that the appellant's appeal be allowed with costs.

Respondent's Submisison

[21] Counsel for the respondents oppose the appeal on the following grounds:

(a) There is no provision in the National Land Code to enable the court to grant declaratory relief;

(b) The appellant failed to exercise his right of appeal pursuant to s. 418 of the National Land Code; and s. 418 provides that the appeal must be made within three months beginning with the date on which it was communicated to him. Although the order to appoint the first respondent as administrator was

given on 8 June 2004 and even if the appellant did not know of the order but going by the date he had filed his caveat on 6 January 2011 ("exh. KS9"), he must have had knowledge of the order well before 6 February 2011 and if time start to run from then, the appellant, is still out of time;

(c) The matter complained of was time barred by virtue of s. 2(a) of the Public Authorities Protection Act 1948 (refer case *Ismail bin Mohamad v. Mayah & 2 Ors* [1987] 1 LNS 60; [1988] 2 MLJ 185, *Development & Commercial Bank Bhd. v. Government of Malaysia & Ors* [1989] 2 CLJ 1205; [1989] 1 CLJ (Rep) 486; [1989] 3 MLJ 359, *Mohd Nadir bin A Syed Ahamed & 13 Ors v. Zubaidi b Abdul Hamid & 2 Ors* [1994] 3 CLJ 204; [1994] 2 MLJ 159);

(d) The appellant failed to show the nexus that he's the grandson of Theilammay d/o Kumarasamy.

Decision Of The Court

Issue 1: Whether The High Court Has Power To Grant Declaratory Relief

[22] It is my view that the court has the general authority under the NLC specially s. 417(1) and 2(a) of the NLC to enable the court to grant declaratory relief to the party aggrieved since there is no other remedy available for the appellant. Section 417 of the NLC clearly provides that "the court or a judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith".

Issue 2: Whether Right To Appeal Barred By s. 418 Of The NLC Or Barred By Virtue Of s. 2(a) Of Public Authorities Protection Act 1948

[23] The provision of s. 418 of the NLC reads as follows "any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal there from to the court".

[24] I am of the view that this provisions is only applicable to any party who has appeared before the Land Administrator and attended the hearing who is not satisfied or aggrieved by the said decision or order given by the Land Administrator is to appeal within three months beginning with the date on which it was communicated to him.

[25] In the present case, the appellant is not an aggrieved person as provided under s. 418 of the NLC because the appellant never attended the hearing before the Land Administrator or neither the appellant was told of the hearing date or about the orders obtained by the first respondent and nothing was communicated to him as to that effect by both the respondents. The appellant only knew of the same on 13 September 2012 when he made a land search at the District Land Office, Kerian, Perak and was stopped from paying the quit rent and assessment for year 2012. To his astonishment the said deceased's estate has been transferred to the second respondent by the first respondent and that the appellant does not have any rights anymore on the said deceased's estate. Further, based on the note of proceeding (exh. KS6) which stated that "(a) ada satu anak Sinathamby, tak ada anak lain" and further "keterangan saksi waris tidak lengkap, it clearly shows that the first respondent has concealed the identity of the other beneficiaries to the said deceased's estate". Thus to my mind the estate was obtained fraudulently and without the appellant's presence. As such the appellant need not comply with s. 418 of the NLC. (Refer case *Ahmad Abd Majeed lwn. Habibah Abdul Majid & Satu Lagi* [2007] 4 CLJ 355).

[26] As regard s. 2(c) of the Public Authorities Protection Act 1948, I am of the view that this section is not applicable in the present case as no action has been brought against the government. (Refer case *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663; [2009] 1 AMR 509).

Issue 4: Whether The Appellant Failed To Show The Nexus That He's The Grandson Of Theilammay d/o Kamarasamy

[27] Based on the affidavit in support, the appellant only managed to produce his birth certificate (exh. "KS1") in the appellant's supporting affidavit. He also affirmed that the birth certificate, death certificate and the marriage certificate between Theilammay d/o Kumarasamy and Verapan Kounder s/o Murugan Kovindan could not be obtained due to the fact that the Registry of the Birth and Death could not locate the same.

[28] It was proven that the appellant's father's name is Sidambaran s/o Verapan who is also a deceased who is the lawful son of the said deceased and is the rightful beneficiary under the estate. However, the appellant's father also died intestate. During his lifetime, the appellant's father, the appellant and the deceased Theilammay d/o Kumarasamy has been staying on the abovesaid property. The appellant is still staying on the said property and was paying the quit rent and assessment for the past 60 over years (exh. KS4). Under the Distribution Act 1958, the appellant's father has the right over the estate of the said deceased being the lawful son and also the other beneficiaries of the estate. So the appellant as the next rightful issue to the said deceased's estate and also the other beneficiaries cannot be denied their right and beneficial interest to acquire/inherit the said deceased's estate.

Issue 5: Whether The Transfer From The First Respondent To The Second Respondent Is Invalid And Ineffective

[29] As stated in my finding above, the first respondent has obtained the deceased's estate fraudulently whereby the first respondent disclosed untrue fact and gave false information to the Land Administrator of Kerian under oath. As a result of this false information in the forms, and false affirmation under oath, the Land Administrator has granted the order to the first respondent.

[30] Upon transferring wholly the said deceased's estate, the first respondent subsequently transferred the same to the second respondent. The question that arise, whether the order to transfer the deceased's estate by the Land Administrator of Kerian to the first respondent cannot be disputed and is final and whether the "ownership of the deceased's estate by the second respondent cannot be nullified".

[31] In the case of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269, the Federal Court held that "(7) It followed that the two charges were liable to be set aside ... it could not take advantage, of the proviso of s. 340(3) of NLC ... whether an acquirer of a registered charge or other interest or title under the National Land Code 1965 by means of forged instrument acquires an immediate indefeasible interest or title" - was answered in the negative. "(8) Once it was satisfied that the charges arose from void instruments, it automatically followed that they were liable to be set aside at the instance of the registered proprietor, namely the appellant".

[32] By adopting the facts of the above case, I am of the view that since the ownership of the said deceased's estate by the first respondent was by way of fraud and misrepresentation, as such the transfer from the first respondent to the second respondent is also invalid, ineffective and has to be set aside.

Conclusion

[33] For the reasons adumbrated above, I allow the appellant's application in encl. 2 with costs RM2,000.